

January 3, 2019

P65PublicComments@oehha.ca.gov

Norton Rose Fulbright US LLP
555 South Flower Street
Forty-First Floor
Los Angeles, California 90071
United States

Ms. Monet Vela
Office of Environmental Health Hazard Assessment
P.O. Box 4010
Sacramento, CA 95812-4010

Jeffrey Margulies
Partner-in-Charge, Los Angeles and San Francisco
Direct line +1 213 892 9286
jeff.margulies@nortonrosefulbright.com

Tel +1 213 892 9200
Fax +1 213 892 9494
nortonrosefulbright.com

Re: Proposed Modifications to Title 27, Article 6 of the California Code of Regulations,
Proposition 65 Clear and Reasonable Warnings, Section 25600.2

Dear Ms. Vela:

These comments are submitted on behalf of California Retailers Association. CRA appreciates the opportunity to comment on OEHHA's Notice of Modification to Text of Proposed Rulemaking to California Code of Regulations, title 27, section 25600.2 pursuant to the Safe Drinking Water and Toxic Enforcement Act ("Proposition 65") dated November 16, 2018.

The California Retailers Association is the only statewide trade association representing all segments of the retail industry including general merchandise, department stores, mass merchandisers, fast food restaurants, convenience stores, supermarkets and grocery stores, chain drug, and specialty retail such as auto, vision, jewelry, hardware and home stores. CRA's mission is to provide effective representation of its diverse membership base through legislative and administrative advocacy.

CRA appreciates OEHHA's recognition of the ambiguities in current section 25600.2, and supports OEHHA's effort to provide needed clarity. We offer the following comments on the specific proposals.

Section 25600.2(b)-(c)

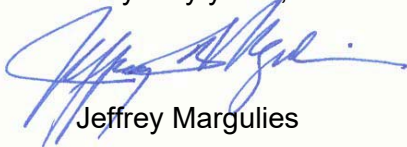
CRA supports the clarification that requires communication of warning materials to the immediate customer of an upstream supplier. Many retailers purchase goods from intermediaries who do not manufacture those goods. By specifying that each upstream entity in the chain must communicate with its own customer, the proposed amended regulation will help to avoid confusion in the marketplace, and will allow retailers to rely upon their communications and contracts with their direct suppliers in determining and allocating responsibility for providing Proposition 65 warnings.

CRA also supports the new language in subsection (c)(2), providing that a supplier may supply notice to the legal agent for service of process. This change will help ensure that, in the event a retailer does not designate an authorized agent, important communications regarding Proposition 65 warnings are not sent to random individuals or job positions at a retailer.

Section 25600.2(f)

CRA appreciates and supports OEHHA's intent to provide more specificity for what constitutes "actual knowledge" based on receipt of a 60-day notice. As we suggested in both written comments and in meetings with OEHHA staff during the 2016 rulemaking, the language of the notice regulation (section 25903) and its supporting final statement of reasons have been construed by some courts to leave open litigation against retailers based on pre-suit notices that identify one or more products by name, SKU or other identifier, but then purport to identify a broader, alleged "specific type" of product as the scope of the alleged violation. For example, courts have held that notices that identify lead or cadmium in "jewelry" is sufficient to allow a private plaintiff to bring a suit over all the jewelry sold by a retailer, even if the notice only identifies one or two specific products that are claimed to expose individuals to a listed chemical.¹ The November 16 proposal takes a positive step by limiting "actual knowledge" to those products that can be "readily identif[ied]" from the information in the notice. However, given that section 25903 allows a notice to identify a "specific type" of product, the regulation (or at a minimum, the final statement of reasons) should clarify that such a notice sent to a retailer does not, in and of itself, "readily identify" any products other than the products that are in fact identified in the notice.

Very truly yours,



Jeffrey Margulies

JBM

cc: Pamela Williams
California Retailers Association

¹ We believe that such rulings are inconsistent with the requirement in section 25903(b)(2)(D) that a notice must provide "sufficient specificity to inform the recipients of the nature of the items allegedly sold in violation of the law and to distinguish those products or services from others sold or offered by the alleged violator for which no violation is alleged." Although it is beyond the scope of this rulemaking, we encourage OEHHA to clarify that such notices – particularly to retailers, where there is no basis to support a certificate of merit for all such products that they sell – are overbroad and do not afford a basis to bring a suit over such a category and seek wide-ranging discovery over all such products,.